

See App

**BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals**



Application of Emory Carlson for a Permit to
Grade the Banks of and Construct Piers on the Bed
of Delavan Lake, Town of Delavan, Walworth
County, Wisconsin

Case No. 3-SE-96-566 & 3-SE-96-600

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMITS

Mr. Emory Carlson, 1505 South Shore Drive, Delavan, Wisconsin, 53115, applied to the Department of Natural Resources for a permit to conduct grading on the bank of Delavan Lake. The purpose of the project will be to demolish the existing Harbor Inn Restaurant and build two new buildings as private residential condominiums. The proposed project is located at the northeast end of the lake along South Shore Drive, in the Town of Delavan, Walworth County in the SW ¼ of the SE ¼ of Section 22, Township 2 North, Range 16 East.

The proposal also involves replacement of existing pier structures with a smaller dock facility to accommodate 24 boats for private use. There are currently accommodations for 36 boats, many of which are available to the public for seasonal rental.

Pursuant to due notice hearing was held on November 11, 1997, at Elkhorn, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties requested the opportunity to submit written closing arguments and the last brief was received on November 28, 1997.

In accordance with secs. 227.47 and 227.53(1)(c), Stats, the PARTIES to this proceeding are certified as follows:

Emory Carlson, by

Paul E. Kremer, Attorney
23 North Wisconsin Street
P. O. Box 470
Elkhorn, Wisconsin 53121-0470

Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, Wisconsin 53705-7921

John E. Davis
1516 South Shore Drive
Delavan, Wisconsin 53115

Dennis Composto
1518 South Shore Drive
Delavan, Wisconsin 53115

FINDINGS OF FACT

1. Emory Carlson, 1505 South Shore Drive, Delavan, Wisconsin, 53115, completed filing an application with the Department of Natural Resources for a permit under sec. 30.12, Stats., to place structures on the bed of Delavan Lake, Town of Delavan, Walworth County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.12, 30.19 and 30.02, Stats.

2. The applicant owns real property located in the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ in Section 22, Township 2 North, Range 16 East, Walworth County. The above-described property abuts Delavan Lake which is navigable in fact at the project site. The subject parcel includes approximately 300 feet of riparian frontage on Delavan Lake.

3. The proposal also involves a separate permit application for grading in excess of 10,000 square feet on the banks of Lake Delavan.

4. The applicant proposes to convert three existing pier structures to accommodate boats maintained by condominium unit owners. Both the grading and pier project are in connection with a proposed plan to remove the existing Harbor Inn restaurant and bar building to construct a 16 unit residential condominium complex consisting of two buildings. The project requires the grading of approximately three acres adjacent to Delavan Lake. There are currently three existing piers at the site, approximately 100 feet in length. The piers are currently capable of mooring 36 boats. Of the 36 existing boat slips, 24 were regularly made available to the public for seasonal rental. The other 12 slips were available for transient mooring for Harbor Inn patrons. The applicant proposes reducing the existing capacity to a maximum of 24 mooring spaces. However, all 24 slips would be reserved for private condominium use. The most recent proposal, offered by the applicant at hearing, is to utilize existing pier cribs and to place piers at existing lengths. The middle pier will be reduced by elimination of the "L" extension. The middle pier would be used primarily as a boat launch. The two main piers, on the east and west

property boundaries, would each accommodate 11 or 12 boats. The three foot water depth, or line of navigation, is approximately 45-50 feet below the ordinary highwater mark.

5. The purpose of both the proposed grading and the pier slip conversion is related to the proposed condominium development at the site of the existing Harbor Inn restaurant and bar.

6. The proposed project site constitutes spawning habitat for large mouth bass, bluegill, and pumpkinseed. (Welch) There have been ongoing efforts in recent years to improve the water quality and fishery on Delavan Lake. (Id.) The DNR Fish Manager, Doug L. Welch, testified that the change in use of the property to private condominiums would likely increase boating activity above historic levels. Further, Welch opined, upscale condominium unit owners at the site are likely to make use of larger motor boats than the current seasonal rental boaters. Welch provided undisputed expert testimony that the expected increase in boating size and activity, despite a net decline in the number of slips, would have a detrimental impact on fishery values because of a disturbance of nests and reduction of cover for smaller fry and fingerling fish. Welch was persuasive that authorization of any pier slip larger than 16 boat slips would have a detrimental impact upon fish spawning and other fishery values at the project site.

7. The proposed 24 slip pier configuration exceeds the "reasonable use" of 300 feet of a private riparian. (Nesta) The DNR has established a program guidance to aid field staff in determining the "reasonable use" of a riparian tract. (Ex. 24) According to Ms. Nesta, the DNR Area Water Management Specialist, the threshold referenced in the guidance document would indicate that this small riparian parcel would ordinarily be entitled to no more than 7 slips. (Id. p. 3) The existing Harbor Inn piers provide the important public benefit of seasonal boat rentals to non-riparian members of the public. The condominium declaration would reserve all available slips for the private use of condominium owners. The Guidance Document reflects the Department's policy to allow a greater number of boat slips for projects that provide seasonal rentals to the public. (Id., p. 4) Nesta opined that, given the longstanding historic placement of the piers, more than the threshold number of 7 slips was appropriate. Further, applying the analytical process set forth in the Guidance, Nesta opined that a reasonable use of the site would be no more than 16 slips if the slips were made available exclusively to condominium unit owners. A preponderance of the credible evidence supports limiting the proposed number of boat slips to no more than 16. This number is more than twice the threshold number suggested by the DNR Guidance on moorings by private riparians. Given the concerns about fish spawning and the likelihood of more intensive boating activity after condominium conversion, 16 slips is at the high end of a reasonable use of this riparian parcel.

8. The Town of Delavan has established a local pierhead ordinance. (Ex. 12) The town has established the pierhead line at "80 feet waterward from the shoreline," for the "purpose of creating uniformity in the length of piers extending from the shoreline into the waterway." (Id.) The existing pier and crib structures would lose their status as "permissible preexisting" piers under the local zoning ordinance and pierhead line one year after change of ownership of these facilities occurs. (Ex. 12) While the current use, which includes seasonal boat rentals, exceeds these numbers, this expanded use is reasonable due to the fact that this is

currently a "marina" facility which provides berthing spaces which are open to the public. (Ex. 24, p 4) The Department was convincing that there is no reasonable basis to approve a pier configuration that exceeds the local pierhead ordinance line

9. The applicant is financially capable of constructing, maintaining, monitoring or removing the structures if they should be found in the public interest to do so.

10. The proposed structures will not reduce the effective flood flow capacity of Delavan Lake upon compliance with the conditions in the permit.

11. The proposed structures will not adversely affect water quality nor will they increase water pollution in Lake Delavan. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats., if the structures are built and maintained in accordance with this permit.

12. The proposed structures will not materially obstruct existing navigation on Lake Delavan and will not be detrimental to the public interest upon compliance with the conditions of this permit.

13. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

14. The proposed grading will not injure public rights or interest and will not cause environmental pollution as defined in sec. 299.01, Stats. All of the expert testimony indicated that the project will likely lead to an improvement in water quality, so long as the project is undertaken in compliance with the permit conditions set forth below. The Department expressed concerns that the proposed walkway may not comply with the Town Ordinance restricting such walkways to one within 75 feet of the lake. However, the applicant's engineer was persuasive that the walkway as proposed would pose no environmental problems and would likely contribute to erosion control. If the Town has no objection, the record did not support inclusion of a specific permit condition changing the proposed plans and specifications for the walkway.

15. Considerable time was devoted at hearing to the issue of the effect, if any, of a public right of way easement on the neighboring Flitcroft property. (Ex.27) None of this testimony established a nexus between the right of way and the proposed permits.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.

2. The proposed facilities described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.
3. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
4. Every right which a riparian owner acquires, as such, to the waters by his land, is restricted always to that which is a reasonable use, and these terms are to be measured and determined by the extent and capacity of the lake, the uses to which it has been put, and the rights that other riparian owners on the same lake also have. Sterlingworth Condominium Ass'n v. DNR, 205 Wis. 2d 702, 716, 556 N.W.2d 79 (Wis. Ct. App. 1996).

The DNR has prepared a program Guidance document to aid field staff in making "reasonable use" determinations. The guidelines illustrate the DNR's experience and expertise in regulating piers under sec. 30.12, Stats. *Id.*, p. 723. The guidance sets a presumption of "reasonable use" at two spaces at a pier for the first fifty feet or lesser amount of shoreline and one more space for each additional fifty feet of shoreline in common ownership. However, DNR employees are to consider other criteria in determining the "reasonable use" of a riparian tract. *Id.*, p. 722-723. Placement of more than 16 boat slips exclusively for the use of private condominium owners would exceed a reasonable use of the project site.

5. The proposed grading will not injure public rights or interest in Delavan Lake, and will not cause environmental pollution as defined in sec. 299.01(4), Stats., and will result in no material injury to the rights of any neighboring riparian owners, so long as the project is undertaken in accordance with the permit conditions set forth below. The project as proposed conforms to the requirements of laws for the platting of land and for sanitation and meets the standards for issuance of a grading permit set forth in sec. 30.19(4), Stats.

6. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMITS

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under sec. 30.12, Stats., for the construction of structures as described in the foregoing Findings of Fact, and a permit to grade the banks of Delavan Lake pursuant to sec. 30.19, Stats., subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.

3. A copy of this permit shall be kept at the site at all times during the construction of the structures
4. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then.
5. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
6. The permittee shall notify the Water Management Specialist, Liesa Nesta, not less than five working days before starting construction and again not more than five days after the project has been completed.
7. Any area disturbed during construction shall be seeded and mulched or rippedraped as appropriate to prevent erosion and siltation.
8. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agreed to follow all conditions of this permit.
9. You must advise any prospective purchasers of the property about this permit, and its terms and conditions.
10. This permit is transferable to a new property owner who intends to build the proposed condominium development, subject to all the terms and conditions of this permit.

Specific Grading Permit Conditions

11. The permittee must provide the Department with final grading and erosion control plans and a calendar of the sequence of construction, at least thirty days prior to commencement of construction.
12. All erosion control measures must comply with the Best Management Practices identified in the Wisconsin Construction Site Handbook.
13. The permittee must provide the Department with a list of the names, addresses and onsite phone numbers of all contractors, landscapers, and inspectors that will be working on the project. This list must be provided at least five days prior to commencement of construction.
14. Removal of site vegetation may not begin until immediately before earth-moving begins on the site, and after all erosion control measures are installed.
15. Removal of vegetative cover and exposure of bare ground must be restricted to the minimum amount necessary for construction. You must protect areas of exposed soil from erosion by seeding and mulching, riprap, sodding, diversion of surface runoff, installation of straw bales or silt screens, construction of settling basins, or similar methods as soon as possible after removal of the original ground cover and before construction is completed

16. No portion of the bank or upland which is altered or disturbed and, as a result, unstable may remain unprotected or unstabilized for more than three days (72 hours).

17. All erosion control measures must be inspected at least twice a week and after every rain event, and maintained throughout the duration of grading activity and until the site is stabilized with vegetation. Any defects in erosion control measures must be repaired within 24 hours of a problem being detected by any contractor, inspector, Town, County or DNR representative.

18. No permanent structures shall be constructed or placed within 75-feet from the shoreline, with the following exceptions: one walkway, as described in the project plans, not to exceed four feet in width may be constructed for access from the residences to the lake.

Specific Pier Permit Conditions

19. The permittee must provide the Department with final pier plans which conform to all conditions listed below, at least thirty days prior to commencement of construction.

20. The permittee is authorized to place two piers at this property, with each pier to provide no more than eight berths. The total number of boat moorings allowed at this property for private condominium use is sixteen.

21. Prior to commencement of condominium construction, the existing piers may remain in place and continue to be maintained with public rental boat slips. At the time of conversion to condominium development, the terms and requirements of this pier permit shall apply and the number of berths must be reduced to sixteen.

22. No support cribs may be installed or placed on the lakebed in conjunction with pier placement. Existing cribs must be removed prior to installation of new piers.

23. Pier dimensions may not exceed 80 feet in length for each pier, six feet in width for any portion of the pier decking, or 45 feet in overall width of the pier parallel to shore, including any catwalks or boat slips.

24. Boat slips or catwalks between the berths shall be constructed to designate the specific locations for boat mooring. The first mooring on each pier must be located at least 25 feet lakeward of the existing shoreline, to prevent motorboat impacts to the shallow nearshore area.

25. Piers shall be installed and maintained consistent with all Town and County requirements.

26. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on December 30, 1997.

STATE OF WISCONSIN DIV. OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By: Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.